

necessary to prevent infringement of intellectual property rights in the material MVPDs distribute to their subscribers.³⁹

ITI and CompTIA concur that MVPDs should be allowed to take reasonable measures necessary to protect the security of their systems and services. Because of the potential for MVPD abuse of this right, however, the Commission should limit non-competitive MVPDs to demonstrable mechanisms tailored specifically to protection of security, and it should prohibit non-competitive MVPDs from packaging or offering consumers security and non-security CPE in a way that could disadvantage competing CPE providers.

A number of commenters has urged the Commission to allow MVPDs to offer CPE combining security and non-security (*e.g.*, program selection) functions. The Commission should allow non-competitive MVPDs to offer such integrated CPE only in very limited circumstances. If a non-competitive MVPD seeks to provide its customers with CPE combining non-security and security functions, it should first be required to demonstrate to the Commission that it had no alternative but to offer the integrated product, given its individual circumstances and security needs, *and* that offering the integrated product will not inhibit competition by other CPE providers.

The Commission should leave to the affected industries any decision as to whether a specific mechanism (such as smart cards or the Decoder Interface) should be adopted (and if so, which) to protect MVPD security while furthering

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TW Comments at 16-17; Viacom Comments at 17.

the goals of Section 629. Specific proposals by some commenters in this regard should be set aside as inherently asking the Commission to become involved in private standards setting. If the Commission takes any action in this area, it should give serious consideration to industry's need for flexibility and cost-effectiveness in designing and producing consumer goods, particularly in an area, such as this, that is characterized by rapid technological change.

III. THE SCOPE OF THESE RULES SHOULD BE DETERMINED SOLELY BY THE COMPETITIVENESS OF MVPDs' MARKETS, NOT BY ARBITRARY LINE-DRAWING.

A surprising number of commenters who have addressed the appropriate scope of Section 629 and its implementing rules has focused on arbitrary criteria that are wholly irrelevant to, and would undermine, the purposes of Section 629. ITI and CompTIA propose a more rational interpretation of Section 629's scope that is based on a literal reading of the statute.

- A. Every non-competitive MVPD should be subject to the rules adopted in this proceeding; and the level of competition each MVPD and class of MVPD faces should be assessed using the statutory standard for sunseting the rules.

As noted above, ITI and CompTIA have proposed that the test for applicability of Section 629 and its implementing rules be whether an MVPD or group of MVPDs faces meaningful competition in *both* its (or their) CPE *and* services markets within its (or their) service area(s).⁴⁰ This simple test is based on Section 629(e)'s standard for sunseting the rules, and is therefore fitting for

⁴⁰ ITI believes, however, that consumers' right to attach CPE to any MVPD's system should apply to all MVPDs, regardless of the applicability of the other rules adopted herein.

determining the scope of the rules from the outset. Moreover, our proposed test would be easy to administer and would advance the purposes of Section 629 more effectively than any other test commenters have proposed.

Unlike the approaches advocated by several other commenters, the test ITI and CompTIA have proposed is not based on strained statutory interpretations⁴¹ or artificial distinctions based on the *CPE* an MVPD provides.⁴² Instead, we believe that applicability of the rules should be decided based on the fundamental purpose of Section 629 -- to promote competition in non-competitive MVPD markets. Where healthy competition exists -- as it appears to among DBS operators -- these rules would be unnecessary.

- B. The Commission should apply its rules to all non-competitive MVPDs and any CPE they offer consumers to access their services, irrespective of idiosyncratic characteristics of particular CPE.
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As we have repeatedly stated, if an MVPD does not face effective competition in the provision of both CPE and services, it (and all the CPE it provides for use with its system(s)) should be subject to Section 629 and the rules adopted thereunder. The type of CPE an MVPD provides to consumers is completely irrelevant to the most fundamental problem Section 629 seeks to address, *i.e.*, how to create competition in non-competitive MVPD markets. If an MVPD has dominant market power in programming services within its service

⁴¹ See, *e.g.*, NCTA Comments at 39 (rate-regulated cable systems should be exempt); CERC Comments at 12 (any MVPD whose CPE is not nationally portable should be included).

⁴² *E.g.*, NCTA Comments at 8-13 (analog CPE and cable modems should be exempt under Section 629(d)); Echelon Comments at ii (only digital CPE should be subject to rules under Section 629(a)).

area(s), it will be able to leverage that power to inhibit competition in the provision of any and all CPE it furnishes for use with those services. Thus, the Commission should reject any argument that a particular class of CPE should be exempted from these rules without consideration of the market power of the MVPD(s) that furnishes it. Such arguments are merely indirect, backdoor attempts by their advocates to exclude a class of MVPDs that would otherwise be subject to the rules, as demonstrated below.

Several commenters have argued that analog CPE should be exempt from the rules adopted in this proceeding, and that the rules should apply only to digital CPE.⁴³ As we stated in our initial Joint Comments, exempting an entire class of MVPDs based on the CPE they furnish -- particularly in the case of analog CPE, which predominates among monopoly cable systems -- would be arbitrary and would undermine the purposes of Section 629. To address technical differences between analog and digital CPE, the Commission should craft its rules so that they are flexible enough to accommodate both, taking into account the significant differences between the two. Under no circumstances should the Commission provide an unwarranted competitive advantage to already non-competitive MVPDs merely because they furnish analog CPE.

Commenters supporting the exemption of analog CPE have argued that it is more difficult to protect MVPD system security with analog devices than with digital devices, and therefore, requiring analog devices to be made commercially

⁴³ *E.g.*, NCTA Comments at 8; GI Comments at 39; Echelon Comments at ii.

available would pose a serious risk of signal theft and piracy to analog MVPD systems.⁴⁴ Others have asserted that it is unnecessary to adopt rules for analog CPE because CPE is becoming increasingly digital.⁴⁵ While the first argument has some sympathetic appeal, the second is completely specious.

ITI and CompTIA are sensitive to MVPDs' interest in protecting the security of their systems and program services, and, as explained above, we believe that MVPDs should be permitted to take whatever steps are reasonably necessary to protect system security. However, the record is devoid of any persuasive evidence that analog MVPD transmission systems would be unable to implement adequate security measures if they are required to make their CPE commercially available.

The argument that rules are unnecessary for analog CPE because CPE is becoming increasingly digital fails the straight-faced test. First, the vast majority of CPE in use today is analog CPE. Second, the MVPDs that provide that CPE are to a great extent monopoly cable system operators. Third, there is no explicit statutory basis for exempting analog CPE as a class from the reach of Section 629 or its implementing rules. Fourth, exempting MVPDs that provide analog CPE could actually *discourage* the transition to digital, by giving MVPDs offering analog CPE a competitive advantage in the form of FCC-sanctioned protection from competition. When an MVPD offering analog CPE faces effective

⁴⁴ E.g., NCTA Comments at 9-10; GI Comments at 39-41; Echelon Comments at 32.

competition in both program services and CPE, that MVPD can be exempted from the rules; until then, it should not be.

In addition to those commenters that have advocated an analog/digital CPE distinction, some commenters have argued for exemption of various classes of devices either because they are "network equipment" (rather than customer equipment) or because they are in the early stages of deployment. Again, by focusing on the nature of the CPE rather than the MVPD that provides it, these arguments both miss the mark.

Section 629(a) explicitly extends only to "equipment used by consumers to access multichannel video programming and other services offered over [MVPD] systems."⁴⁵ ITI and CompTIA acknowledge that MVPD transmission facilities and associated equipment on the MVPD's side of what should be the customer demarcation point, if not used by the customer to access MVPD services, would not be CPE subject to Section 629. But any other equipment that a non-competitive MVPD furnishes to consumers to access any of its services will fall within the literal scope of Section 629(a), and should be subject to Section 629's implementing rules.

Certain commenters have classified at least two types of equipment as "network equipment" that they assert is outside the scope of Section 629(a) because consumers do not use it to access MVPD services. Contrary to their

⁴⁵ *E.g.*, Echelon Comments at 39; Ad Hoc Computer & High-Technology Coalition Comments at 9-10.

⁴⁶ 47 U.S.C. § 549(a).

position, the Commission has hypothesized that this equipment -- network interface modules (or "NIMs") and residential gateways -- "might be within the scope of the statute."⁴⁷

NIMs are devices that perform many of the same security or access control functions as other navigation devices, but are located at the point of entry to a consumer's residence, either inside or outside.⁴⁸

A residential gateway is

a broadband, multi-function piece of equipment which may be located inside the consumer's residence, and which serves as an interface device between a broadband residential access network or networks and multiple types of customer terminal equipment, such as televisions, telephones, and personal computers. The design philosophy of this equipment is to extend the scope economies of the network to the residence by providing a low-cost platform with terminal equipment interfaces and relieving the subscriber of the burden of buying multiple network interface devices.^[49]

To the extent a non-competitive MVPD furnishes NIMs or residential gateways to its customers to enable them to access some or all of the MVPD's services, such devices fall within the scope of Section 629, and there is no defensible basis for allowing the MVPD to provide the devices without complying with the requirements of Section 629.

⁴⁷ NPRM at ¶ 18; see NCTA Comments at 18; GI Comments at 45.

⁴⁸ NCTA Comments at 18.

⁴⁹ GI Comments at 43-44.

Moreover, if a non-competitive MVPD introduces a new type of CPE to enable consumers to access its services, it is completely inconsequential that the CPE -- such as a cable modem -- may be in the early stages of deployment. An MVPD with market power in the program services market can easily prevent competition from developing in the production or sale of a new type of CPE it offers consumers to access its services. Therefore, *any* CPE a non-competitive MVPD offers consumers to access some or all of its services, regardless of its nature or stage of commercial deployment, should be subject to the Section 629 rules, absent a valid waiver for such CPE.

Finally, some commenters have argued that the Section 629 rules should apply to any equipment that is "designed to interact with an MVPD's system to select particular channels, programs, or services."⁵⁰ These parties argue, for example, that computers, television sets, and VCRs that incorporate network-interdependent functions, such as digital audio and video decoding, demodulation, demultiplexing, and security, should be subject to the Section 629 rules.⁵¹

We agree that, to the extent such equipment may be offered in the future by non-competitive MVPDs, it should be subject to Section 629's requirements. At this point, however, the computer, VCR, and television markets are fiercely competitive, and non-competitive MVPDs typically do not offer these products.

⁵⁰ Comments of Bell Atlantic and NYNEX at 5.

⁵¹ *Id.* at 3 - 5.

Because Section 629 is targeted primarily at MVPDs rather than CPE, if non-competitive MVPDs do not furnish these products to consumers, there is no basis for extending the Section 629 rules to computers, VCRs, and televisions at this time.

IV. THE COMMISSION SHOULD STRICTLY CONSTRUE THE THREE-PART STATUTORY STANDARD FOR SUNSET OF THE RULES ADOPTED IN THIS PROCEEDING.

Several commenters that have addressed the question of when the Section 629 rules should sunset have completely ignored the three-part standard contained in Section 629(e)⁵² and proposed in its place a far more lenient measure of competition that would relax the rules prematurely.

For example, General Instrument and NCTA have both argued that the rules applicable to all cable systems should sunset when national DBS penetration reaches ten percent.⁵³ There is no statutory or logical basis for concluding that a potential competitor having a ten percent national market share (not even taking into account local market variations) would satisfy the standard Congress had in mind when it drafted Section 629(e).

The broad brush approach proposed by Time Warner -- that the rules applicable to all MVPDs should simultaneously sunset nationwide -- is overly simplistic and ignores competitive variations in product and geographic markets.

⁵² Under that section, the rules should sunset only when (1) an MVPD's programming market is fully competitive; (2) the market for the CPE used with that MVPD's system is fully competitive; and (3) elimination of the regulations would promote competition and the public interest.

⁵³ NCTA Comments at 43-44.

As such, it could disproportionately harm some classes of MVPDs (those seeking to compete against dominant firms) while giving others (the dominant firms) a competitive advantage.

It is unnecessary for the Commission to start from scratch in crafting standards for sunseting the Section 629 rules. Congress has provided explicit guidance in Section 629(e). Indeed, in light of that guidance, it would be an abuse of discretion for the Commission to develop any standard that conflicts with the Congressional directives in Section 629(e).

V. THE COMMISSION SHOULD GRANT LIMITED WAIVERS OF THE RULES WHEN NECESSARY TO INTRODUCE OR DEVELOP NEW TECHNOLOGY, PRODUCTS OR SERVICES, BUT THE WAIVER PROCESS SHOULD BE DESIGNED TO PREVENT CIRCUMVENTION OF THE RULES.

ITI and CompTIA are strong supporters of hands-off regulation, and we encourage the Commission to make full use of its authority under Section 629(c) to grant waivers when necessary for the development of new or improved technology, products, or services. We recognize that firms subject to the Section 629 rules may require limited waivers to develop, test, and assess consumer acceptance of new products. But a vaguely defined waiver process would invite abuses by dominant firms seeking to avoid their obligations under Section 629 and establish control in new product markets.

The potential for such abuses is demonstrated by the initial comments of certain parties. General Instrument, for example, has proposed that the

Commission should not prescribe the information that a waiver applicant must provide in support of its request, but instead should treat each waiver application on a case-by-case basis. Moreover, waivers should be granted for whatever period of time an applicant requests, according to GI. There should also be a rebuttable presumption that waiver requests will be granted and such requests should be automatically granted if the Commission fails to act on them within 90 days.⁵⁴ Time Warner and (to a lesser extent) NCTA have made similar proposals with respect to the waiver process.

These proposals depart in obvious and significant ways from the explicit terms of Section 629(c), which provide the standard for granting a waiver as well as guidance as to the nature of waivers themselves. Unlike General Instrument's proposal, Section 629(c) defines a clear standard for granting waiver applications: the applicant must have made "an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products."⁵⁵ Furthermore, the statute specifically states that waivers are to be "for a limited time."⁵⁶

ITI and CompTIA urge the Commission to grant waivers liberally while adhering closely to the requirements and limitations contained in Section 629(c).

⁵⁴ GI Comments at 87-89.

⁵⁵ 47 U.S.C. § 549(c).

By doing so, the Commission can encourage innovation while deterring anti-competitive conduct.

CONCLUSION

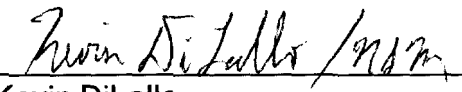
In crafting rules to implement Section 629, the Commission should never lose sight of the fundamental purpose underlying that provision: to promote competition in the provision of CPE used with MVPD systems. If the Commission tailors its rules to achieving this objective alone, it will fulfill its statutory mandate.

It should not be sidetracked by claims that other competing policy objectives deserve a higher priority than promoting competition in non-competitive MVPD markets.

Respectfully submitted,

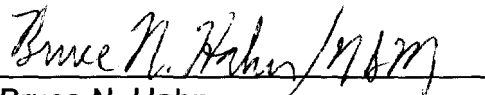
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